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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS BACA,

Defendant and Appellant.

2d Crim. No. B287037
(Super. Ct. No. 2001004190)
(Ventura County)

Jose Luis Baca appeals from a postjudgment order denying his motion under Penal Code¹ section 1473.7 to vacate his 2001 guilty plea conviction of assault with a deadly weapon (§ 245, subd. (a)(1)). Appellant contends his motion should have been granted on the ground that his trial attorney provided ineffective assistance of counsel by misadvising him regarding the immigration consequences of his plea. We affirm.

¹ All statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

In May 2001, appellant was charged by information with committing an assault with a deadly weapon (i.e. a cord), making criminal threats (§ 422), and false imprisonment by violence (§ 236). It was further alleged that appellant personally inflicted great bodily injury (GBI) upon the victim in committing the assault (§ 12022.7, subd. (a)), personally used a firearm in making the criminal threats (§ 12022.5, former subd. (a)(1)), and personally used a dangerous or deadly weapon in committing the false imprisonment (§ 12022, subd. (b)(1)).

In June 2001, appellant pled guilty to the assault with a deadly weapon charge and admitted the GBI allegation. Appellant entered his plea with the understanding he could be sentenced to up to 7 years in state prison. Before pleading guilty, he also signed and initialed a plea form containing numerous advisements. One of the initialed advisements states appellant's understanding that "[i]f I am not a citizen, I could be deported, excluded from the United States or denied naturalization." Appellant's attorney, Stanley Arky, also signed the guilty plea form to acknowledge, among other things, that "I have explained the direct and indirect consequences of this plea to the defendant and am satisfied he understands them."

After accepting appellant's guilty plea, the court suspended imposition of sentence, placed him on five years felony probation with terms and conditions (including a 365-day jail term), and dismissed the remaining charges. Appellant successfully completed his probation in July 2006.

Removal proceedings were initiated against appellant in April 2016. In September 2017, he filed a motion to vacate his conviction pursuant to section 1473.7.

At the hearing on the motion, appellant testified that he was living with his wife and three children when the criminal charges were filed against him. Appellant and the victim, Leticia Razo (now Leticia Baca), were having an extramarital affair.² When he agreed to plead guilty, he did not understand that doing so would lead to his deportation. Had he known it would have that consequence, he would not have accepted the prosecution's plea bargain. Arky did not advise him of the immigration consequences of his plea and told him that if he accepted the plea bargain he would be able to return to his normal life after serving some jail time. Although appellant signed and initialed the plea form, he did not actually read it and no one reviewed it with him. He trusted what Arky had told him.

Appellant's daughter, Carmen Baca, testified that she was 23 years old when appellant was charged with the assault. After appellant was charged, he was released on bail and continued to live with his family. He asked Carmen to continue living at home with her mother and two younger siblings while he served the jail term imposed as a condition of his probation.

Arky testified that he had no current recollection of his representation of appellant. It was, however, his practice and procedure to review with his clients every section they were required to initial on a guilty plea form. In every case, Arky would have reviewed with his client the paragraph setting forth the possible immigration consequences of the plea.

Based on his customary practice, Arky would not have told appellant that he did not have to worry about being deported. He did not believe, however, that he would have told appellant that

² Appellant and Leticia Baca became reacquainted in 2011 and married in 2013.

his deportation would be mandatory. Arky did not consult with an immigration attorney or refer appellant to one. When appellant entered his plea, immigration consequences were considered a collateral issue.

After hearing arguments from both counsel, the court denied the motion. The court reasoned that “[e]ven if there may have been some technical error as to the [immigration consequences] advisement in 2001, . . . there is no evidence that [appellant] was prejudiced in such a way that he would not have entered a plea at the time knowing of some consequence that may or may not have taken place in the future despite the fact that federal law appears to state that it’s mandatory deportation.”

DISCUSSION

Appellant contends the trial court erred in denying his motion to vacate his conviction under section 1473.7. We conduct de novo review and conclude otherwise.

Section 1473.7 provides in pertinent part: “A person who is no longer in criminal custody may file a motion to vacate a conviction or sentence [if] . . . [t]he conviction or sentence is legally invalid due to a prejudicial error damaging the moving party’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.” (*Id.*, subd. (a)(1).) The statute “allows a defendant, who is no longer in custody, to challenge his or her conviction based on a mistake of law regarding the immigration consequences of a guilty plea or ineffective assistance of counsel in properly advising the defendant of the consequences when the defendant learns of the error postcustody.” (*People v. Perez* (2018) 19 Cal.App.5th 818, 828.) The burden is on the defendant to show, by a

preponderance of the evidence, that he or she is entitled to relief. (*Id.* at p. 829.)

“Ineffective assistance of counsel that damages a defendant’s ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a guilty plea, if established by a preponderance of the evidence, is the type of error that entitles the defendant to relief under section 1473.7. [Citation.] To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and that he was prejudiced by the deficient performance. [Citations.]” (*People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 75 (*Ogunmowo*)).

In reviewing appellant’s claim, “[w]e accord deference to the trial court’s factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel’s deficient performance and resulting prejudice to the defendant. [Citations.]” (*Ogunmowo, supra*, 23 Cal.App.5th at p. 76.)

To establish the requisite prejudice resulting from counsel’s misadvice or failure to advise regarding the immigration consequences of his plea, a defendant must demonstrate “a reasonable probability . . . that, but for counsel’s incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial. [Citations.]” (*In re Resendiz* (2001) 25 Cal.4th 230, 253 (*Resendiz*); *Strickland v. Washington* (1984) 466 U.S. 668, 687-688 [80 L.Ed.3d 674, 693-694].) A defendant’s assertion that he would not have pled guilty but for counsel’s misadvice or failure to advise regarding the immigration

consequences of the plea “must be corroborated independently by objective evidence.” (*Resendiz* at p. 253.)

“Surmounting *Strickland*’s high bar is never an easy task,’ [citation], and the strong societal interest in finality has ‘special force with respect to convictions based on guilty pleas.’ [Citation.] Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.” (*Lee v. United States* (2017) — U.S. —, [198 L.Ed.2d 476, 488] (*Lee*).) In determining whether prejudice has been established in this context, courts must consider the likelihood of success at trial, the potential consequences after a trial compared to the consequences flowing from the guilty plea, and the importance of immigration consequences to the defendant. (See *id.* at p. — [*id.* at pp. 486-487].)

In ruling on appellant’s motion, the trial court presumed that appellant had not been properly advised that his guilty plea would lead to his deportation. The court found, however, that appellant failed to establish he would not have pled guilty and insisted on going to trial had he known of the immigration consequences of his plea.

We agree with this finding. Appellant offered no evidence regarding the facts upon which the charges against him were based. Instead, he asserted (and reiterates on appeal) that the strength of the prosecution’s case against him was simply irrelevant to the analysis. The United States Supreme Court has held otherwise. “Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one.” (*Lee, supra*, — U.S. at p. — [198

L.Ed.2d at p 486].) Because appellant offers no record of the relevant facts, he also fails to show that the prosecution would have agreed to an immigration-neutral disposition. (*People v. Olvera* (2018) 24 Cal.App.5th 1112, 1118.)

Moreover, in exchange for appellant's guilty plea, the prosecution dismissed two other felony charges. By pleading guilty, he avoided a possible 13-year prison sentence on the criminal threats count and attendant firearm use allegation (§§ 422, 12022.5, former subd. (a)(1)), and a four year term on the false imprisonment count (§§ 236, 237, 12022.5, former subd. (a)(1)).

Finally, appellant offered no contemporaneous evidence to support his assertion that the immigration consequences of his plea were of paramount importance to him. In *Lee*, the defendant had repeatedly asked his attorney if he could be deported and counsel testified that the defendant would have proceeded to trial had he known he would face deportation. (*Lee, supra*, — U.S. at p. — [198 L.Ed.2d at pp. 485-488].) No such evidence was offered here. Although he testified at the hearing that the benefits of his plea bargain played no part in his decision to plead guilty and that he would not have done so had he known of its immigration consequences, these “*post hoc* assertions” were insufficient to establish the requisite prejudice. (See *id.* at p. — [*id.* at p. 487].) Because appellant failed to establish that he would have insisted on going to trial on all charges had Arky advised him that his guilty plea would result in his deportation, his motion to vacate his conviction on the ground of ineffective assistance of counsel was properly denied. (*Resendiz, supra*, 25 Cal.4th at p. 254.)

DISPOSITION

The order denying appellant's motion to vacate his conviction pursuant to section 1473.7 is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

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